

14.09.2021

KABG040023492017



ORDER ON COMMISSIONER REPORT

The plaintiff had filed an application for appointment of Court commissioner at I.A.No.VI to collect the evidence of P.W.4 i.e., Pratap S/o. Vaijnath Uchagaonvkar. Accordingly, the order was passed on the said application. Later, the Court commissioner by name Shri. Sunil Akkatangerhal counsel was appointed on consent of both parties. Accordingly, the commissioner warrant was issued on 05.03.2020. Later, on 13.03.2020 he had filed board application for seeking original documents which were to be marked by the P.W.4. Hence, the Court was ordered and permitted the Court commissioner to get the documents from the records of this suit and execute the commission work. Accordingly, after execution of his work, he submitted his report on 02.10.2020 and same has placed on record. Further on submission of the

Court commissioner report, the counsel for defendant filed objections to the said report by stating that the Court commissioner has not intimated the defendant about the date of recording of evidence of P.W.4. Further he has stated that, on 07.03.2020, the Court commissioner had served notice on the defendant by fixing the date of Court commissioner work on 15.03.2020. But, on same day due to non-availability of original paper, he could not execute his work and he had stated to the defendant that he will intimate the date of execution of work once he gets original documents from the Court. But, later he has not brought the date to the notice of the defendant on the day of recording of evidence of P.W.4. Without informing the defendant, the Court commissioner executed his work on 20.03.2020, but on 16.03.2020 the Courts were stopped working due to pandemic and Court commissioner has also not issued any notice to the defendant or orally intimated about the date of execution of his commission work. Hence, the defendant could not attended the Court commission work on the date fixed by the Court commissioner, in the absence of the defendant, the Court commissioner executed his work and filed the report

and defendant had dispute with respect to the documents which were marked through the P.W.4 on execution of commissioner work. Hence, he sought to direct the Court commissioner to subject himself for cross-examination and prayed to reject the report submitted by the Court commissioner.

2. Heard both the sides and perused the materials available on record.

3. Before going into factual aspects of the present case, it is just and necessary to discuss the provisions of Order-XXVI Rule-1 of the C.P.C., which reads as thus :

**“Cases in which Court may issue
commission to examine witness**

Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it :

[PROVIDED that a commission for examination on interrogatories shall not be

issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

Explanation : The Court may, for the purpose of this rule, accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person, without calling the medical practitioner as a witness.

4. On careful reading of the above provision, it states that, the Court may in any suit issue a commission for examination of any person resident of within local limits of the jurisdiction, who is exempted from attending the Court or who is from sickness or infirmity unable to attend it and further Rule-7 of the C.P.C. states about return of commission with deposition of witness, where a commissioner has been duly executed, it shall be returned, with the evidence taken under it to the Court and on return of the evidence taken under the commission work shall form part of the records of the suit. But here, in the case on hand, the defendant is objecting to accept the Court commissioner report on the ground that, he has not been given the opportunity for attending the

recording of evidence of P.W.4 and he has not given opportunity to cross-examine the P.W.4. The reason stated in his objection is that, the Court commissioner did not intimate the date of recording the evidence. On perusal of the Court commissioner report, there is handwritten order-sheet of the Court commissioner it depicts that, on 15.03.2020 the Court commissioner has written the proceeding. The said proceeding needs to be extracted here.

“Commissioner work started at 12.15pm at the residence of PW-4. PW-4 is present, Adv for Plaintiff is present, Plaintiff is present, Defendant absent and Adv for Defendant is present. RPAD notice of the Commission work sent to the PW-4 is duly served. Accordingly PW-4 is also present. At this stage Advocate for Plaintiff and defendant insisted for original Court file for the evidence of PW-4. But original file is not available. Hence case is posted for original file and evidence of PW-4.

Call on 20.03.2020 at 05.30 pm.”

Sd/-

5. On careful reading of the above proceeding, it appears that the counsels for plaintiff and

defendant were present at the residence of P.W.4 on service of notice by the Court commissioner. At that moment, both the advocates insisted for original Court file for examination of P.W.4. But, same was not available with them. Hence, for want of original file and for evidence of P.W.4, it was posted on 20.03.2020. Hence, the entire proceedings written on 15.03.2020 shows that the counsel for defendant was very well present at the residence of P.W.4 and it is to be noted that the counsel has signed beside the proceeding dated 15.03.2020, which clearly depicts in the handwritten order-sheet of the Court commissioner. But, during the course of his argument, the counsel for defendant submitted that the signatures of the counsel for the defendant has taken on blank sheet, later proceedings have been written by the Court commissioner by assigning the subsequent date, hence, he could not know about the next date of the Court commissioner work. This reason appears to be very baseless, because if the layman or rustic person would have signed on the order-sheet and contended that, he had signed on the blank paper and contents have been written subsequently, then that would have been considered for a moment. But here, the advocate

who is having awareness about law is contending in such manner that cannot be accepted at all.

6. Further, if for a while the contention of the defendant taken into consideration that he has signed on the blank paper later the Court commissioner has written the proceedings, what resisted the counsel for defendant to approach the Court commissioner and get the date of the commissioner work has not been explained. Even though he has stated that it is the duty of the Court commissioner to intimate the same. But here, in the case on hand, the documents clearly shows that the counsel for defendant has signed the proceedings wherein the next date of the commissioner work has been written. Under such circumstances, the question of duty of the Court commissioner does not arise, when record shows that by taking into notice of the next date the counsel for defendant has signed the order sheet maintained by the Court commissioner.

7. Further, the Court had given opportunity to file objections to the application filed by the Court commissioner to get original documents from the Court on 13.03.2020, 16.03.2020 and 17.03.2020. But, on three adjournments also defendant

remained absent. Later, the Court passed the order by enabling the Court commissioner to collect original documents from the file.

8. Further, the defendant has contended that on 16.03.2020 due to pandemic, the Courts had stopped their work, it is to be noted that the Courts were very well functioning on the said date and till 23.03.2020, the Courts were fully functioning and there was no any order of closure of Court. This contention of the defendant cannot be considered at all and it cannot be an objection to reject the Court commissioner report. When the documents available on record clearly show that, the counsel for defendant was very well present on the assignment of adjournment to the Court commissioner work, the contention raised by the defendant that he has not been given the opportunity and not intimated about next date can not be accepted.

9. Further, defendant has taken contention in his objection that, he had objections to mark the documents which have got marked by the P.W.4 , if it is so, he has any objections with respect to the marking of documents as contended in their objection, mere marking of documents does not

amounts to proof of the documents and hence the said objection is not ground to reject the Court commissioner report.

10. Therefore, the three main contentions which have been taken by the defendant in his objection such as, not intimating the date of Court commission work, the due to pandemic situation the closure of Court and objections as to marking of document have not been properly substantiated by the defendant and those reasons are not suffice to reject the Court commissioner report. Hence, the Court commissioner report needs to be accepted Hence, the Court pass the following :

ORDER

The Court commissioner report dated 03.10.2020 is hereby "ACCEPTED". The evidence of P.W.4 is hereby placed on record.

Further it is hereby made clear that, the evidence of P.W.4 shall be part and parcel of the record for determination of dispute.

**IV Addl. Civil Judge & J.M.F.C.,
Belagavi.**

O.S.No.643/2017

For further plaintiff evidence.

**IV Addl. Civil Judge & J.M.F.C.,
Belagavi.**